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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-70

THE STATE OF MONTANA, Acting by and through the MONTANA DEPARTMENT OF INSTITUTIONS, *Petitioner*,

v.

ROBERT ELMER GLICK, et al., *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of Montana

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully oppose the petition for writ certiorari as follows:

STATUTES INVOLVED

In addition to the constitutional and statutory provisions of the State of Montana and the provisions of the Fair Labor Standards Act of 1938, as amended, set

forth in the petition (pp. 2-5), the following provision of the Fair Labor Standards Act of 1938, as amended, is involved:

Section 18, 52 Stat. 1069, as amended, 29 U.S.C. § 218:

> "(a) No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act."

STATEMENT OF THE CASE

Section 3(d) of the Fair Labor Standards Act of 1938 (hereinafter referred to as the "FLSA") was amended (80 Stat. 831, 29 U.S.C. § 203(d)), effective February 1, 1967 (80 Stat. 844), to modify "the definition of 'employer' so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions and schools." *Maryland* v. *Wirtz*, 392 U.S. 183, 187 (1968), which upheld the constitutionality of that amendment. Respondents (26 in all), who were employed by the Montana Children's Center, an institution of the State

of Montana administered by its Department of Institutions, thus were brought under the protection of the FLSA effective February 1, 1967.[1]

Although other State institutions under the Department of Institutions were on an 8-hour day and a 40-hour week throughout the period covered by this lawsuit (Tr. 183), and the employees were paid in compliance with the FLSA, this was not true of the Montana Children's Center and its employees (respondents). They worked substantially more than 40-hours per week and were paid a monthly salary that did not include any compensation for working overtime until February 1, 1969. On that date, as the trial court found (Pet. App. C, at 39), petitioner adopted an "hourly wage rate based upon the formula and finding, now adopted by this Court" and affirmed by the Montana Supreme Court.[2] Consequently, during the two-year period between February 1, 1967 and January 31, 1969, petitioner did not comply with the requirement of Section 7(a)(1) of the FLSA (29 U.S.C. § 207(a)(1))

[1] The applicability of the amended FLSA to respondents was upheld by the Montana Supreme Court in an earlier decision in this case reported as *Glick* v. *State, Montana Department of Institutions*, 157 Mont. 204, 485 P.2d 42 (1971). That decision is not questioned by petitioner in this Court. Some of the respondents were first employed by the Children's Center after February 1, 1967, but all were employed by the Center for at least part of the period, between that date and February 1, 1969, to which the litigation relates.

[2] The Montana Supreme Court reversed the trial court's finding that respondents worked 80 or 81 hours per week, concluding that the "sum total of the evidence shows work weeks running from sixty-five to seventy-five hours per week" (Pet. App. A, at 18), and remanded the case for recomputation of the precise totals (Pet. App. A, at 16-18). Although that ruling was made in the decision sought to be reviewed, it is not questioned here by petitioner or by respondents.

that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ." [3] Respondents thus are entitled to recover the overtime compensation improperly withheld (50% of "the regular rate" on an hourly basis) during that period. This is not questioned here by petitioner.

The issues raised in the petition relate only to the ruling by the courts below as to respondents' "regular rate" of compensation upon which the improperly withheld overtime compensation is to be computed. Petitioner contends that that "regular rate" must be determined (after converting respondents' monthly compensation into weekly compensation) by dividing respondents' weekly compensation by the number of hours actually worked during the particular week. Both the trial court (Pet. App. C, at 39) and the Montana Supreme Court (Pet. App. A, at 18-21), however, construed provisions in the Montana Constitution (Art. XVIII, Sec. 4) and a Montana statute (Section 41-1121, R.C.M. 1947), establishing an 8-hour day and 40-hour workweek for State employees such as respondents, to afford respondents under the circumstances of this case a "regular rate" of pay computed on an hourly basis by dividing their weekly compensation by 40 hours. As a result, respondents were entitled

[3] With respect to employees, such as respondents, brought within the coverage of the FLSA by the amendments effective February 1, 1967, the maximum workweek was fixed at 44 hours during the first year and at 42 hours during the second year, and did not become 40 hours until the expiration of the second year after that effective date. 80 Stat. 842, 29 U.S.C. § 207(a)(2).

to more overtime compensation than they would have been entitled to under petitioner's contention as to the manner in which the "regular rate" should be determined.

The Montana Supreme Court noted (Pet. App. A, at 21), as the trial court had found (see p. 3, *supra*), that "this formula" had been adopted by petitioner itself "commencing February 1, 1969, when the computer payroll went into effect" after which the employees of the Montana Children's Center were "paid on a basis of a forty hour workweek and for time and a half on hours worked in excess of forty." Thus, respondents' complaint (filed on June 25, 1969) was limited to the two-year period between February 1, 1967 and January 31, 1969, the judgment below is limited to that period, and this litigation does not concern anything either before or after that period.

The Montana Supreme Court also set aside the trial court's award of liquidated damages to respondents (Pet. App. A, at 21-29) and remanded an award of attorney's fees to the trial court for modification (Pet. App. A, at 29-30), as well as remanding the issue of hours worked for recomputation (see fn. 2, p. 3, *supra*). Respondents have not and do not request this Court to review those rulings and, of course, petitioner does not seek to have them reviewed by this Court.

ARGUMENT

The people of the State of Montana, in adopting Art. XVIII, Sec. 4 of its Constitution, the legislature of the State of Montana, in adopting Section 41-1121 of its statutes, and the judiciary of the State of Montana, in construing and applying those State constitutional and statutory provisions, all have determined

that the "regular rate" of pay of employees of the State of Montana shall be computed, in the circumstances of this case, in a manner more favorable to the employees than otherwise would be required for purposes of calculating overtime compensation under Section 7(a) of the FLSA.[4] The Montana Department of Institutions, an agency of the State of Montana obviously cannot attack directly the policy thus adopted by the people and the legislature of the State and this Court does not have jurisdiction to review a State court's interpretation of the constitution or laws of the State even at the behest of a private party.

Petitioner has sought to cast this case, therefore, into the mold of a conflict between the State laws as thus construed and the FLSA as construed by this Court in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572 (1942). In essence, petitioner contends that the FLSA prohibits the State of Montana from providing by law for a method of computing the "regular rate" of pay of employees of the State that results in their being entitled to more overtime compensation than if that "regular rate" were computed by the method approved in *Missel*.

It is true that this Court in *Missel* approved the computation of the "regular rate" of pay of employees

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[4] Dividing respondents' average weekly compensation by the 40 hour workweek fixed by the State constitutional and statutory provisions for State employees obviously results in a higher "regular rate" of pay than would dividing their average weekly compensation by the 65 to 75 hours actually worked. This in turn results in higher overtime compensation, as that is based on the "regular rate" of pay.

[5] See, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

paid a weekly salary by dividing the actual hours worked during the week into that salary, where the employment contract did not otherwise specify the "regular rate." See 316 U.S., at 580-581. The Court did not hold, however, that the "regular rate" could not be otherwise established, even in regard to employees of private concerns. Rather, in *Walling* v. *Belo Corp.*, 316 U.S. 624 (1942), decided on the same day as *Missel*, the Court upheld the specification in an employment contract of the portion of a weekly salary that represented the hourly "regular rate" of the employees, where that rate exceeded the statutory minimum. It "is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract." 316 U.S., at 631. And, the fact that under this method of computation the overtime component of the weekly wage exceeded that required by the FLSA was not improper since "the Act does not prohibit paying more. . . ." 316 U.S., at 632.

We think it even more clear that the FLSA does not prohibit a State from "paying more" to its own employees by virtue of State laws regulating the employment of those employees. From the very beginning, Section 18 of the FLSA has provided that "[n]o provision of this Act or of any order thereunder shall excuse noncompliance with any . . . State law . . . establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act. . . ." 29 U.S.C. § 218 (a). The court below (Pet. App. A, at 20-21) quoted at length and relied upon the opinion in *State* v. *Comfort Cab, Inc.*, 118 N.J. Super 162, 286 A.2d 742 (1972), which concluded, *inter alia*, that by reason of Section 18 of the FLSA "it is clearly the intent of the Congress that

a lower state maximum hour regulation, creating a
overtime arrangement more favorable to the employe
than that contained in [29 U.S.C.] § 207 of the federa
act, should prevail." 286 A.2d, at 748.

Eastern Sugar Associates v. *Pena,* 222 F.2d 93
(1st Cir., 1955), cert. den., 350 U.S. 900 (1955), per
haps is even more directly in point. That case sustaine
the application of a Puerto Rico statute "more favor
able to the employee than the Federal act in that i
provides that the guaranteed weekly wage is to b
divided by the number of 'regular hours' worked, i
this case 40, instead of by the actual number of hour
worked, in determining the 'rate agreed upon fo
regular hours' which is the basis for computing tim
and a half for extra hours worked." 222 F.2d, at 93
In so holding, the Court of Appeals quoted the per
tinent portion of Section 18 of the FLSA and state
that: "Thus, the States, and this undoubtedly include
the Commonwealth of Puerto Rico, are given freedo
of action to establish higher standards than thos
established by the Federal act." 222 F.2d, at 936. Se
also, *C. Brewer Puerto Rico, Incorporated* v. *Corchad*
303 F.2d 654 (1st Cir., 1962).

While the *Comfort Cab* and *Pena* cases involve
State wage and hours laws, for present purposes ther
is no difference in principle between such laws and th
Montana laws establishing for State employees a mor
favorable "regular rate" of pay for purposes of Se
tion 7(a) of the FLSA than is required by that Ac
The important point is that under Section 18 of th
FLSA a State may, in the words of *Comfort Ca*
create "an overtime arrangement more favorable
the employee than that contained in" Section 7(a
of the FLSA or, in the words of *Pena,* "establi

higher standards than those established by the Federal act."

The petition makes no reference to Section 18 of the FLSA or to the decisions thereunder, other than to note that the court below cited *Comfort Cab* as authority (Pet., at 7), and thus makes no effort to demonstrate that the court below erred in relying upon Section 18 as so construed. The *Missel* decision and the lower court decisions following *Missel,* relied upon by petitioner, did not involve the application under Section 18 of State laws more favorable to the employees than the requirements of the FLSA. Hence, even if *Missel* had held—which it plainly did not—that arrangements made by private employers with their employees cannot provide for more overtime compensation than is required by the FLSA, that decision would not conflict with the decision below.

We submit, therefore, that the decision below is clearly correct and does not conflict with the *Missel* decision or, insofar as we are aware, with any other decision of this Court or of the lower courts. This case basically turns upon the application of constitutional and statutory provisions of the State of Montana, and does not involve any issues of general importance under federal law. Even as to employees of the Montana Department of Institutions, the significance of this case is limited to the respondents for the two-year period between February 1, 1967 and January 31, 1969. It was only in regard to those employees that petitioner failed to pay the overtime compensation required, after the FLSA was made applicable to employees of State institutions effective February 1, 1967, and petitioner has voluntarily compensated employees of the Montana Children's Center since Febru-

ary 1, 1969 on the basis subsequently adopted by the courts below for the two-year period in question. Plainly, therefore, this is *not* a case where, in the language of this Court's Rule 19, "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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